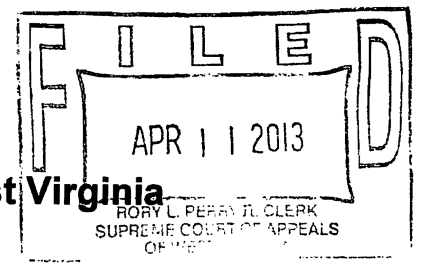

In the Supreme Court of Appeals of West Virginia

DOCKET NO. 12-1259

STATE OF WEST VIRGINIA, Plaintiff
Below, Respondent,

v.

Appeal from a Final Order
of the Circuit Court of
Wayne County (10-F-17)

JAMES E. MARCUM, Defendant
Below, Petitioner.

Reply Brief of the Appellant

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REPLY

The State contends that the Circuit Court made no error in the order it took evidence in the suppression hearing—despite the Court's own acknowledgement that it didn't understand the procedure correctly and the Appellant would not have had to testify.

The Appellant set out in detail in his Appellant's Brief why his statement should have been suppressed, and will not repeat that argument here, although he could no doubt do so in addressing the State's Response Brief. Instead, the Appellant will refer the Court to the appropriate portion of his brief via citation when necessary.

This Reply Brief, then, will focus on how a wholly different result could have been achieved had the Court not forced the Defendant onto the witness stand at the suppression hearing, and, therefore at trial of this matter.

THE "REVERSE ORDER" SUPPRESSION HEARING

a. The Appellant would not have had to testify at the suppression hearing

The State argues that "the Petitioner would have been compelled to testify to rebut the State's testimony that his statement was given voluntarily, even if the State had gone first. In support of that, the State cites a 35-year-old South Carolina case:

> Had the State put this evidence on first, the Petitioner would have been compelled to testify to rebut it. "[S]ince the State had evidence of the statement and its voluntariness, the presentation of this evidence first would have made it imperative that appellant testify in order to make an issue as to its admissibility, thus affording the Solicitor the same opportunity to observe appellant as a witness." *State v. Scott,* 237 S.E.2d

886, 890 (S.C. 1977), *overruled on other grounds by State v. Foust,* 479 S.E.2d 50 (S.C. 1996).

In fact, the Appellant would not have been compelled to testify, and, that State would have been hard pressed have carried its burden of showing the voluntariness of the Appellant's statement without his testimony.

Accordingly, the Court's findings in its suppression hearing "Order" entered October 21, 2010 [AR 101] would have been absent some key elements. These elements, which went specifically to the issue of voluntariness of the statement, would have been absent because they were taken from the Appellant's testimony. And the Appellant would not provided these had he not been forced to testify because of the Court's admitted misunderstanding of the suppression hearing process.

These findings are:

> 5. That during the Motion to Suppress hearing, the Defendant gave testimony that he recalls making the statement and executing Exhibit 1;
>
> 6. That the Defendant did not assert that he did not understand his rights as contained in Exhibit 1;
>
> 7. That the Defendant admitted that his statement did not result from any form of coercion; [AR 102]

In essence, the Court's findings about the Appellant assertions regarding knowing his rights (albeit stated in a double negative) and the Appellant's comments that he remembered making the making the statement and executing a rights waiver as well as there being no "coercion" involved in taking it, would not have been available.

The State would have been left with the State Trooper Ramey's "opinion" that "the Defendant appeared to understand the question and answers contained in the

statement'" and, "That during the videotaped statement, the Defendant appeared to understand the questions and answers given." [AR 102, paragraphs 7 and 8]

It should be noted that paragraph 2 [AR 101] is the only other one which helps the State, "That the Defendant was read his constitutional rights as contained in Exhibit 1 and the Defendant signed State's Exhibit 1;". Otherwise, the remaining paragraphs of the order simply recite that the Defendant was a patient at Three Rivers Medical Center and was taking pain medication at the time the statement was taken, factors that the Court records in the order, but from which it draws no conclusions.

b. The Court's Order Can Be Written to Suppress the Appellant's Statement

If the proffer initially made by Defense Counsel could be brought out through cross examination of the state witnesses, and the Appellant was not forced to testify first, the Appellant's statement could have been just as easily suppressed as admitted.

First, the Court already made a finding in paragraph 4 [AR 101], "That at the time of making his statement on December 10, 2009, the Defendant was receiving pain medication." Having accepted the introduction of the Defendant's medical information as a "proffer," without the State's objection, [Vol 1 - PTH1 - p 18] the Defendant had already placed significant information in the record regarding the medication he was receiving at the time of the statement to State Police.

The Defendant had shown that he was receiving a nearly constant flow of Demerol through an IV attached to the back of his left hand—every six to seven minutes—for pain, which the medical records chart as a 10 on a scale of 10. [Vol 1 -

PTH1 - p 15] Marcum also was receiving Percocet every four hours, which had started at noon. [Vol 1 - PTH1 - p 14]

When the two West Virginia State Troopers interviewed him after midnight, Marcum was still laying in his hospital bed, in his hospital gown, with the IV sticking out of the back of his hand, recovering from surgery earlier in the day. During the statement, while the officers are questioning him, a nurse comes into his room and obstructs the video camera's view of Marcum while she's apparently giving him some additional pain medication, according to the hospital chart, because he's still on the Demerol drip for pain. Just minutes after the video statement is over, at 12:15 a.m., Marcum again judged his pain to be 10 out of 10. [Vol. 1 - PTH1 - p 16]

Trooper Drake testified that while Marcum seemed coherent to him while being interviewed at the hospital, that it was apparent that Marcum was in pain, moaning when he moved and grasping his sides where the knife wounds were. Trooper Drake said this was consistent with the way people react when they are in pain. Marcum advised Tpr. Drake that he had had surgery. [Vol 1-PTH1 – pp 39, 40] Further, Drake admitted at trial that when the two troopers took Marcum's video statement at around midnight, that they had no idea of the effects of Marcum's medication,[1] nor did they ask the medical staff about it. [Vol 2-JT2 – p 15]

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1 It seems highly doubtful that a State Police Trooper would have no idea of the effects of Demerol or Percocet, two highly abused drugs which have been the subjects of numerous State Police arrests and which are routinely tested in the State Police Laboratory.

Cross examination ground-without the Defendant's testimony--becomes whether the Trooper knew that Demerol was a narcotic, whether the trooper knew that Demerol and Percocet were drugs used illegally, whether the drugs were known to create a "euphoric" effect among users. After a few minutes of these types of questions, the undersigned can assert with some confidence that the Trooper would admit that such drugs (particularly when compared to alcohol) impair judgment and lower inhibitions. Without boring

Therefore, the Court's findings could just as well have been:

1. The Defendant was read his Constitutional Rights from a form waiver brought to his hospital room at Three Rivers Medical Center around midnight by the W.Va. State Police on December 10, 2009, which is filed as Exhibit 1 of the suppression hearing.

2. The Defendant signed said form where he was directed to do so, although it is obvious from viewing the video tape of the statement that the Defendant took no time to read the form himself after the troopers read it to him.

3. Further, the State Police did not advise the Defendant that the form he was signing was a waiver, or giving up his Miranda rights. Instead, the Defendant was told by Sr. Tpr. Drake "I need you to sign and initial ***here that I read these rights to you***." [Vol 2-JM1 - p 2] (emphasis added)

4. The Defendant had been brought into the hospital that morning and had surgery for two stab wounds to his body. The Defendant told the troopers this and they acknowledged that the Defendant's actions were consistent with somebody in pain.

5. Further, during the interview with the State Police, the Defendant received an additional dose of pain medication through an IV pic line in his hand, which is clearly visible on the video taped statement.

6. The parties have stipulated to the Defendant's medical records, and they show that the Defendant had received an intravenous Demerol drip of 25 milligrams every six to seven minutes for pain, and had received Percocet beginning at noon on that day, once every four hours.

7. The Court finds that both of these medications are powerful pain killers, and that Demerol is a synthetically derived form of morphine, and that such medicines can affect the judgment of the recipient.

8. That the situation was inherently coercive, due to the police coming to the Defendant's hospital room after midnight while the defendant was heavily medicated on narcotic pain medication, on the same day he had undergone surgery for two stab wounds ostensibly received less than 24 hours earlier.

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the Court with the details, the cross examination questions about drugs, tactically, would be woven around questioning about the pain which the Trooper admitted he observed the Defendant experience, in order to maintain focus on the Defendant's condition without letting the Trooper concentrate solely on one line of questioning. While forcing the trooper's focus toward the effects of pain—something the Trooper would readily acknowledge he had experienced—the examination would suddenly relate pain impairment with alcohol impairment and finally drug impairment, so that, if all lined up well, the trap could be sprung to gain an acknowledgement that the distraction of pain coupled with the administration of the drugs would make it "possible" for one's will (and by extension, "voluntariness") to be affected.

9. Further, that while the State Police advised the Defendant that he was not under arrest, they nonetheless read the Defendant his Miranda rights.

10. The form rights waiver which the State Police read to the Defendant advised him that he was under arrest, and that it was for the crime of murder. Nonetheless, the State Police troopers told the Defendant that he was not under arrest.

11. Because the State Police could not transport the Defendant promptly to a neutral magistrate for arraignment due to the Defendant's medical condition, literally nothing would have been different about the procedure had they arrested the Defendant or not, other than to pronounce the words that he was "under arrest."

12. The Court finds that the circumstances of the taking of the statement from the Defendant were such that the Defendant did not give the statement voluntarily and of his own free will:

> The burden is on the State to prove by a preponderance of the evidence that extrajudicial inculpatory statements were made voluntarily before the statements can be admitted into evidence against one charged with or suspected of the commission of a crime. Syl. Pt. 1, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995).
>
> Due process requires that the statements obtained from petitioner in the hospital not be used in any way against him at his trial, where it is apparent from the record that they were not "the product of his free and rational choice," *Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S.Ct. 1152, 1153, 20 L.Ed.2d 77, as quoted in *Mincey v. Arizona*, 98 S.Ct. 2408, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)

Therefore, it is the ORDER and JUDGMENT of this Court that the videotaped statement given by the Defendant from his hospital room be and hereby is SUPPRESSED, and shall not be used at trial of this matter. The exception of the State of West Virginia is preserved.

c. The Appellant would not have had to testify at trial

In addition, the Appellant would not have had to testify at trial. It is apparent, when reviewing the trial transcript and leaving out all that the Appellant provided via his

drugged hospital bed statement, that the State's presentation of evidence would have changed severely.

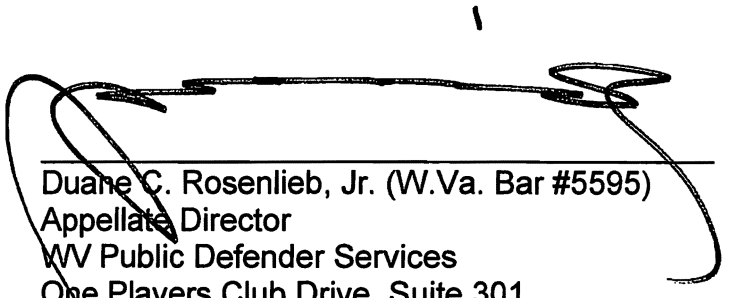
Therefore, the State, which already suffered a reduction of its requested verdict from first degree murder to second degree murder, may have received a verdict more in line with the Appellant's claims of self-defense.

CONCLUSION

The Appellant has clearly shown how, if the Court had not conducted the suppression hearing in such a way that the Appellant would have to testify, that the Appellant's video taped statement to the State Police could have been suppressed and not come into evidence.

The mistakes made by the Circuit Court in shifting the burden to the Appellant during the suppression hearing, clearly had such an impact on these proceedings that the Appellant's right to a fair trial and adequate due process under the law must be qustioned. Therefore, the Appellant's conviction should be reversed, and this matter should be remanded for a new trial.

JAMES E. MARCUM
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on April 11, **2013**, true and accurate copies of the foregoing **Reply Brief Appellant** was served on the parties below in the manner as indicated:

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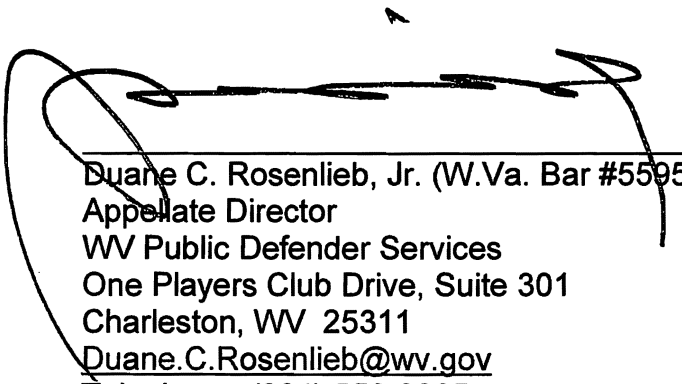

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